No. 17-340

In The
Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NATIONAL EMPLOYMENT LAW PROJECT, INC., ECONOMIC POLICY INSTITUTE, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICI

Amici are worker membership and advocacy groups that confront and combat independent contractor misclassification in lower-wage jobs. Amici are concerned that a ruling in favor of Petitioner New Prime, Inc. ("Prime") would create incentives for more companies to misclassify their employees as independent contractors in order to evade worker protections.[1]

Founded in 1903, the International Brotherhood of Teamsters represents more than 1.4 million hardworking men and women across the United States, Canada and Puerto Rico. A significant segment of Teamster membership work as drivers in the transportation industry. Teamster work involves transporting containers of goods from the nation's ports, through the supply chain to retail stores and consumers' homes. Teamsters are conducting a long-standing campaign to organize port truck drivers, the vast majority of whom are misclassified as independent contractors. The Teamsters' interest in this case is to ensure that all drivers involved in interstate commerce, including those classified as independent contractors, are afforded the exemption granted to contracts of employment in the transportation industry found in Section 1 of the Federal Arbitration Act ("the Act"). The Teamsters are also concerned that Prime's errant suggestion that

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[1] Amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, as provided in Rule 37.6. This brief is submitted with the consent of both parties under Rule 37.3(a).

employment relationships under the Act should be identified by the terms of the contract alone may affect misclassification analysis under other statutes.

The National Employment Law Project (NELP) is a non-profit organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA'S PORTS, in 2010, and THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT, in 2014. NELP has litigated and participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for, and are deterred from, skirting those basic rights.

The Economic Policy Institute (EPI) is a non-profit organization with over 30 years of experience analyzing the effects of economic policy on the lives of American's working families. EPI has studied and written on the misclassification of workers and wage theft. This research includes publishing the report (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION (2015), which examines the misclassification of workers across the economy including the pervasiveness of the practice in

the trucking industry. EPI has also participated as *amicus curiae* in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all employees enjoy the full protections of labor and employment laws and that employers are not permitted to misclassify workers.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

Truck drivers, like the Respondent Dominic Oliveira, are frequently misclassified by their employers as independent contractors. This treatment excludes drivers from basic labor and employment protections like the minimum wage, health and safety, and discrimination protections, to name a few. This Court does not need to determine whether in fact Mr. Oliveira was misclassified by Prime, because he and the company entered into a contract of employment that should be exempt under the plain language of the Federal Arbitration Act. But if the Court decides that the employee versus independent contractor relationship must be decided in order to determine the applicability of the FAA, it should take into account the independent contractor misclassification problems endemic in the trucking industry, the impacts on workers, other employers, and state budget and tax coffers, and on employers' economic incentives to misclassify more drivers that will result.

Independent contractor misclassification, and the worker abuses it engenders, are pervasive in the trucking industry and exemplified by the facts of this case. Prime classifies its drivers as "company drivers," who are treated as employees, or alternatively as "independent contractors," although the work of these drivers is the same. J.A. 118, 136. Prime labeled Mr. Oliveira as an independent contractor, but far from operating his own business, Prime exercised substantial control over Mr. Oliveira's work and prevented him

from working for any other company. J.A. 138, 160. The company controlled his schedule, limited which shipments he could take, and set the rate of payment for those shipments. J.A. 119, 138. Under the independent contractor agreement, Prime made regular deductions from Mr. Oliveira's paycheck for expenses such as "lease payments" on the truck, tools Prime required him to buy, and fuel. J.A. 138. As a result, Prime failed to pay Mr. Oliveira the statutorily required minimum wage and overtime for his work. Indeed, on several occasions, the deductions reduced his pay to zero, and on other occasions even resulted in Mr. Oliveira owing money to Prime. J.A. 120-21.

The plain text of the Federal Arbitration Act requires this Court to find that truckers' independent contractor arrangements like the one in this case are "contracts of employment" and exempt from the FAA's coverage. Amici write to emphasize the policy consequences of a holding to the contrary. Independent contractor misclassification and the unlawful and exploitative working conditions it engenders are rampant across the economy, but particularly prominent in the trucking sector. Employers like Prime, whose drivers in some weeks earn negative earnings, are incentivized to misclassify workers in order to avoid baseline labor standards, payroll tax, and other liability. Misclassification results in substantial losses to public coffers and harm to law-abiding employers, who are forced to compete with companies that chisel wages in a race to the bottom. Perhaps most importantly, misclassification deprives workers of essential workplace

protections and allows employers to perpetrate exploitative worker abuses like those faced by Mr. Oliveira and his colleagues. If the Court finds for Prime, companies like Prime will be further incentivized to classify drivers as independent contractors, whether or not the drivers are truly running their own business, and workers will face substantial obstacles in challenging their misclassification and their job conditions.

Finally, should the Court find that the "contract of employment" analysis requires a determination of whether or not a worker is in fact an independent contractor, such a determination must follow long-standing common law to consider all incidents of the employment relationship, and not just the terms of the contract.

ARGUMENT

I. INDEPENDENT CONTRACTOR MISCLASSIFICATION IS A RAMPANT AND GROWING PROBLEM, PARTICULARLY IN THE TRUCKING INDUSTRY, AND A RULING IN FAVOR OF THE PETITIONER WILL REWARD MISCLASSIFYING EMPLOYERS.

Employers have economic incentives to misclassify workers as independent contractors, and accordingly misclassification is a rampant problem, particularly in the trucking industry. Misclassification is a calculated business decision. Employers who misclassify workers are able to unlawfully lower their operating costs. By

failing to pay the taxes and other payroll costs required for employees, law-breaking employers are able to pocket as much as 30% of payroll costs.[2] This robs unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reduces federal, state, and local tax withholding and revenues. As the United States Government Accountability Office (GAO) concluded in its July 2006 report:

> [E]mployers have *economic incentives* to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.[3]

The U.S. Department of Labor's Commission on the Future of Worker-Management Relations (the "Dunlop Commission") similarly concluded, "[t]he law should not provide incentives for misclassification of employees as

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[2] NATIONAL EMPLOYMENT LAW PROJECT (NELP), INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2017), available at http://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017.

[3] GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006) (emphasis added).

independent contractors, which costs federal and state treasuries large sums in uncollected Social Security, unemployment, personal income, and other taxes."[4]

Given these incentives and the challenges of enforcement, independent contractor misclassification is a pernicious problem. According to data from the May 2017 Contingent Worker Supplement to the Current Population Survey, independent contracting is now the primary source of employment for 10.6 million workers in the United States, characterizing 6.9% of primary employment.[5] The U.S. Department of Labor has found that as many as 30% of firms misclassify their employees as independent contractors,[6] and studies commissioned by state governments often cite estimates that are even higher.[7] These studies suggest that millions of workers nationally may be misclassified.[8] Notably

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[4] U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1995), available at http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.

[5] UNITED STATES BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS – MAY 2017 (2018), available at https://www.bls.gov/news.release/pdf/conemp.pdf.

[6] LALITH DE SILVA ET AL., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS i-iv (2000), available at http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[7] NELP, *supra* note 2.

[8] NATIONAL EMPLOYMENT LAW PROJECT (NELP), INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT (2016), available at http://www.nelp.org/publication/independent-contractor-vs-employee/.

these studies likely provide conservative estimates of the true scope of misclassification.[9]

Misclassification is particularly rampant in the trucking industry. Approximately 82% of port truck drivers are labeled independent contractors, but an estimated 80% of those drivers are employees under the law and hence misclassified by their employers.[10] New research also suggests that the 80% figure may underestimate the actual prevalence of misclassification in port trucking.[11] A significant shift from employees to contractor classifications in long-haul trucking evidences a similar phenomenon. The number

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[9] Many of the studies are based on unemployment insurance tax audits of employers registered with the state's UI program. The audits seek to identify employers who misclassify workers, workers who are misclassified, and the resulting shortfall to the UI program. Researchers extrapolate from UI audit data to estimate the incidence of misclassification in the workforce and its impact on other social insurance programs and taxes. These UI audits miss a large portion of the misclassified workforce, however, because they rarely identify employers who fail to report any worker payments to state authorities or workers paid completely off-the-books – the "underground economy" – where misclassification is generally understood to be even more prevalent. *See* NELP, *supra* note 2.

[10] REBECCA SMITH, PAUL ALEXANDER MARVY & JON ZEROLNICK, THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT 29 (2014), available at http://www.justice4ladrivers.net/BigRigOverhaul2014Finalsm.pdf. Port truck drivers pick up containers from or deliver containers to a seaport or intermodal rail terminal and take them a short distance to a warehouse or a rail head within the same state. From there the container is either unpacked and the goods trucked to other states or transported out of state via rail.

[11] *Id.*

of non-employer establishments (i.e., purported "independent contractors") in long-haul general freight trucking grew by 91.1% between 1997 and 2016,[12] while the number of employees increased by only 5.9% over the same period.[13]

Across jurisdictions, and amidst a diverse landscape of tests for distinguishing employees from independent contractors, administrative agencies have routinely found that employers have wrongly classified truck drivers as contractors. In over four hundred decisions by California's Division of Labor Standards and Enforcement,[14] the agency found that employers

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[12] *See* UNITED STATES CENSUS BUREAU, NONEMPLOYER STATISTICS (NES) (1997–2016), available at https://www.census.gov/programs-surveys/nonemployer-statistics/data/datasets.html.

[13] *See* UNITED STATES BUREAU OF LABOR STATISTICS, EMPLOYMENT, HOURS, AND EARNINGS FROM THE CURRENT EMPLOYMENT STATISTICS SURVEY (NATIONAL) (1997–2016), available at https://data.bls.gov/PDQWeb/ce.

[14] Under the agency's economic realities test used for the adjudications, the most significant factor to be considered is whether the employer has control or the right to control the worker, both as to the work done and the manner and means in which it is performed. Additional factors that may be considered are whether the person performing services is engaged in an occupation or business distinct from that of the principal; whether or not the work is a part of the regular business of the principal or alleged employer; whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; the alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers; whether the service rendered requires a special skill; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the alleged employee's opportunity for profit or loss depending on his or her managerial skill; the length of time

wrongly classified truck drivers as contractors.[15] Under the same common-law based test, the California Unemployment Insurance Appeals Board has also concluded that truck drivers were identified as contractors when they were legally employees.[16] The results in California mirror agency determinations of port trucker misclassification in New Jersey,[17] and Washington state.[18] State findings of employee status for

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for which the services are to be performed; the degree of permanence of the working relationship; the method of payment, whether by time or by the job; and whether or not the parties believe they are creating an employer-employee relationship. *See S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (Sup. Ct. Cal. 1989).

[15] *See, e.g., Gaitan v. XPO Cartage, Inc.*, Nos. 05-66467 KR, 05-66468 KR, 05-66595 KR, 05-66694 KR (D.L.S.E. Apr. 14, 2017). Hundreds of other decisions are collected here: http://www.nelp.org/wp-content/uploads/CA-DLSE-Cases.pdf.

[16] *See, e.g., Alfaro v. XPO Logistics, Inc.*, No. 5935974 (C.U.I.A.B. Jul. 3, 2017).

[17] *See, e.g., Proud 2 Haul, Inc.*, EIN No. 26073576300000 (D.W.L.D. Feb. 28, 2011). The test under New Jersey law allows for a finding of independent contractor status if the worker is free from the employer's control or direction in performing the work, the work is outside of the usual course of the business and outside of the place of business, and the worker is "customarily engaged in an independently established trade, occupation, profession, or business." N.J. Stat. § 43:21-19(i)(6).

[18] *See Sea Port Logistics* (L&I, Aug. 26, 2011); *RoadLink Services* (L&I, Apr. 10, 2012); *Island Transport Logistics* (L&I, Aug. 24, 2012). The modified ABC test under Washington law allows for a finding of independent contractor status if the worker meets the traditional ABC factors and it can be shown that the worker is responsible for her own costs, has a place of business that is eligible for a business deduction for federal income tax purposes, is responsible for filing with the Internal Revenue Service, has

truck drivers are consistent with agency determinations at the federal level. The Department of Labor's Wage and Hour Division,[19] the Internal Revenue Service,[20] and the National Labor Relations Board[21] have each found in favor of truck drivers who brought claims against their employers for misclassification.

Prime itself has been found to have misclassified its drivers as independent contractors; in a case settled in 2013, female truck drivers called independent contractors by Prime brought sex harassment charges against the company. The district court ruled that "[t]he existence of a contract referring to a party as an independent contractor does not end the inquiry, because an employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship." *Huffman v. New Prime, Inc.*, 2003 WL 22424878 (W.D. Mo. 2003) (internal quotations omitted).

In addition to state and federal agency decisions, private and public litigation have resulted in judicial determinations and settlements admitting that employers misclassified their truck drivers as independent contractors. Federal courts have largely resolved in

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accounts with state agencies, and maintains a separate set of books. R.C.W. 51.08.195.

[19] *See C&K Trucking*, No. 1715102 (W.H.D. Feb. 27, 2018); *Container Connection of Southern California*, No. 1634525 (W.H.D. Jan. 22, 2013).

[20] *See Total Transportation Services, Inc.*, No. 76535 (I.R.S. Nov. 4, 2010).

[21] *See, e.g., Hector Sanchez Rosado v. XPO Drayage, Inc.*, No. 5-CA-194058 (N.L.R.B. Jul. 28, 2017).

favor of employee status. In *Doe v. Swift Transp. Co.*, 2017 WL 67521, at *10 (D. Ariz. Jan. 6, 2017), the U.S. District Court of Arizona found that while a transportation company required its truck drivers to sign independent contractor agreements, the company's significant exercise of control over its drivers indicated they were employees nevertheless. In *Hargrove v. Sleepy's, LLC*, 2016 WL 8258865, at *1 (D.N.J. Oct. 26, 2016), the U.S. District Court of New Jersey granted truck drivers' motion for summary judgment that they were employees under New Jersey law. In *Thomas E. Perez v. Shippers Transport Express, Inc.*, Case No. 2:13-CV-04255-BRO-PLA (C.D. Cal. Nov. 17, 2014), the U.S. Department of Labor and a trucking and freight transportation company entered a consent judgment in which the company admitted to its practice of misclassification and agreed to reclassify its drivers as employees. State court decisions have produced parallel findings.[22] Prime itself has been found to have misclassified its drivers alleging sex harassment. *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014).

Given the numerous financial incentives employers have to misclassify their workers as independent contractors, it is not surprising that misclassification is a widespread problem in general and in the trucking industry in particular. Excluding independent contractors from the FAA's Section 1 exemption for transportation workers will only exacerbate this problem and

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[22] *See, e.g., Romero Garcia et al. v. Seacon Logix, Inc.*, 238 Cal.App.4th 1476, 1488 (Ct. App. 2014).

give employers additional encouragement to misclassify their workers.

II. BAD ACTOR EMPLOYERS MISCLASSIFY WORKERS IN ATTEMPTS TO AVOID TAX AND OTHER LIABILITY, IMPOSING SIGNIFICANT SOCIETAL COSTS ON THE PUBLIC, LAW-ABIDING EMPLOYERS, AND WORKERS.

A. Misclassification harms the public and imposes significant costs to public coffers.

Federal, state, and local governments suffer hefty losses of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums.[23] A 2009 report by the Government Accountability Office (GAO) estimates independent contractor misclassification cost the federal government $2.72 billion in revenue in 2006.[24] According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid

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[23] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/.

[24] GOVERNMENT ACCOUNTABILITY OFFICE, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (Aug. 2009), available at http://www.gao.gov/new.items/d09717.pdf.

FICA taxes and UI taxes.[25] In the port trucking industry specifically, experts estimate that nationally almost 50,000 workers are misclassified, costing the federal government $57,427,456 in lost Social Security and Medicare contributions, in addition to $20,859,254 in lost unemployment insurance premiums, and $484,823,334 in lost workers' compensation contributions.[26]

Misclassification results in billions of dollars in lost state income tax revenue as well. Academic studies estimate that the state of Indiana lost $134.8 million in uncollected state income tax revenues in 2008; Michigan lost as much as $32.5 million in state income tax revenue from misclassification in 2009; and Maine lost an estimated $4.3 million in tax revenue in 2004 just from the construction industry.[27] The state of

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[25] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED (Feb. 4, 2009), available at http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[26] SMITH et al., *supra* note 10.

[27] JAMES I. STURGEON & MICHAEL P. KELSAY, UNIV. OF MO.-KANSAS CITY, SUMMARY FINDINGS REGARDING THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF INDIANA 4 (2010) (estimating that Indiana's unemployment insurance fund lost an average of $36.7 million per year from 2007–2008); DALE L. BELMAN & RICHARD BLOCK, MICH. STATE UNIV., INFORMING THE DEBATE: THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN MICHIGAN 11 (2009), available at http://ippsr.msu.edu/publications/ARMisClass.pdf; FRANCOISE CARRE & RANDALL WILSON, HARVARD UNIV. THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE MAINE CONSTRUCTION INDUSTRY 11 (2005).

California estimates that the annual tax loss due to misclassification is as high as $7 billion.[28]

A growing number of states have been calling attention to independent contractor abuses by creating inter-agency task forces and committees to study the magnitude of the problem, and passing new legislation to combat misclassification. The U.S. Department of Labor has signed Memoranda of Understanding regarding misclassification in thirty-nine states and many of these states have created inter-agency task forces or commissions to work on the problem and issue reports.[29] Along with academic studies and other policy research, the reports document the prevalence of the problem and the attendant losses of millions of dollars to state workers' compensation, unemployment insurance, and income tax revenues. A 2017 review of the findings from the twenty state studies of independent contractor misclassification demonstrates the staggering scope of these abuses.[30]

For example, in California, audits conducted by California's Employment Development Department between 2005 and 2007 recovered a total of $111,956,556 in payroll tax assessments, $18,537,894 in labor code citations, and $40,348,667 in assessments on employment

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[28] STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, WORKER MISCLASSIFICATION, 2018, available at https://www.dir.ca.gov/dlse/worker_misclassification.html.

[29] https://www.dol.gov/whd/state/statecoordination.htm; https://www.dol.gov/whd/workers/misclassification/stateinfo-nojs.htm.

[30] *See* NELP, *supra* note 2.

tax fraud cases.[31] In Tennessee, a 2013 task force report found that 37% of employers misclassified workers, causing a loss to the unemployment insurance system of $8.4 to $15 million, a loss to the workers compensation system of $52 to $91.6 million, a loss of $15.2 to $73.4 million in federal income taxes, and between $7.8 million and $42 million in lost Social Security and Medicare taxes.[32] Ohio's 2009 task force found that 45% of employers misclassified workers, causing a loss of $12 to $100 million in unpaid taxes, $60 to $510 million in unpaid workers' compensation, and $21 to $248 million in unpaid state income taxes.[33]

Given the immense potential for cost to the public, independent contractor misclassification is an issue with uniquely bipartisan support. The U.S. Department of Labor devotes resources to fighting misclassification

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[31] CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, ANNUAL REPORT: FRAUD DETERRENCE AND DETECTION ACTIVITIES, REPORT TO THE CALIFORNIA LEGISLATURE (June 2008), available at http://www.edd.ca.gov/pdf_pub_ctr/report2008.pdf.

[32] NELP, *supra* note 2. *See also* TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE, EMPLOYEE MISCLASSIFICATION EDUCATION AND ENFORCEMENT FUND (EMEEF), available at https://www.tn.gov/workforce/injuries-at-work/injured-workers/injured-workers/employee-misclassification.html.

[33] NELP, *supra* note 2, *citing* REPORT OF THE OHIO ATTORNEY GENERAL ON THE IMPACT OF MISCLASSIFIED WORKERS FOR STATE AND LOCAL GOVERNMENTS IN OHIO, Feb. 18, 2009, available at http://www.faircontracting.org/PDFs/prevailing_wages/Ohio_on_Misclassification.pdf.

throughout Republican and Democratic administrations[34] and as many as 30 states, spanning Republican and Democratic controlled state legislatures, have instituted laws, task forces, or committees aimed at combatting independent contractor misclassification.[35]

B. Misclassification harms law-abiding employers.

Employers that correctly classify workers as W-2 employees are often unable to compete with lower-bidding companies that reap the benefits of artificially low labor costs. As stated by the Treasury Inspector General, "worker misclassification . . . plac[es] honest

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[34] U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/; U.S. DEPARTMENT OF LABOR, $10.2M AWARDED TO FUND WORKER MISCLASSIFICATION DETECTION, ENFORCEMENT ACTIVITIES IN 19 STATE UNEMPLOYMENT INSURANCE PROGRAMS, Sept. 2014, available at https://www.dol.gov/newsroom/releases/eta/eta20141708. In 2014, the DOL awarded misclassification detection grants to ten states in part to "protect the integrity of state unemployment insurance trust funds."

[35] NELP, *supra* note 2. *See also* CT HB 5113 (Pub. Act 08-105), SB 56 (2008); IL HB 1795 (Pub. Act 95-0026) (2008); IN SB 478 (P.L.164-2009); IA Exec. Order No. 8 (2008); ME Exec. Order 23 FY 08/09; MD Workplace Fraud Act of 2009; MA HB 1835 (2008); MI Exec. Order 2008-1 (2008); MN Advisory Taskforce on Employee Misclassification: Report to the 2011-12 Biennium, 87th Legislature; NC Exec. Order 125 (2012); NH SB 500 (2008), Exec. Order 2010-3; NJ Governor's Advisory Comm. on Construction Industry Independent Contractor Reform; NY Exec. Order 17 (2007); NV SCR 26 (BDR R-1297) (2009); OR HB 2815 (2009); RI SB 3099, HB 7907B (2008); UT SB 189 (2008), amended by S11 (2011); VT S.345 (2008), Exec. Order 08-12 (2012); WA SB 5926 (2007).

employers and businesses at a competitive disadvantage."[36] Although "some misclassification is the result of uncertainty . . . most of the cases involving misclassification were done on purpose in order to gain a competitive advantage over employers that obey the law."[37] This is especially a problem in delivery services, construction, janitorial, home care, and other labor-intensive low-wage sectors, where employers can gain competitive advantage by driving down payroll costs. Misclassification, especially when pervasive in an industry, skews markets and can drive responsible employers out of business. Law-abiding employers also suffer from inflated unemployment insurance and workers' compensation costs, as "free riding" employers that misclassify employees as independent contractors pass off costs to employers that play by the rules.

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[36] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS, Feb. 20, 2018, available at https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf. *See also* David Weil, "Lots of Employees Get Misclassified as Contractors. Here's Why It Matters." Harvard Business Review, 5 July 2017, available at https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters ("[W]hen misclassification is adopted as a business strategy by some companies, it quickly undermines other, more responsible employers who face costs disadvantages arising from compliance with labor standards and responsibilities").

[37] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, RUTGERS JOURNAL OF LAW & POLICY 12:1 (2015), available at http://www.ntassoc.com/uploads/files/Bauer_Misclassification_Contractors.pdf.

A 2010 study estimated that misclassifying employers burden society and other law-abiding businesses by evading $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums annually.[38]

C. Misclassification harms workers, deprives them of essential workplace protections, and depresses their income.

When employers unlawfully misclassify employees, they deprive them of the core workplace protections that Congress and the states intended as baseline standards. Misclassification denies workers the entire span of protections that most take for granted: workers' compensation if they are injured on the job, unemployment insurance, minimum wage and overtime protections, and protections against discrimination and sexual harassment.[39] While employers profit from misclassification, workers bear the cost: as a result of their outsized tax burden, unreimbursed

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[38] NELP, *supra* note 2, *citing* Douglas McCarron, "Worker Misclassification in the Construction Industry," BNA Construction Labor Report (Apr. 7, 2011), available at https://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_-_McCarron_on_Misclassification_4-7-2011_sm.aflb.ashx.

[39] NELP, *supra* note 2. The federal Department of Labor notes on its website that misclassified employees "often are denied access to critical and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces." U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, available at https://www.dol.gov/whd/workers/Misclassification/.

business expenses, and the prevalence of wage and other violations, misclassified workers' net income is often significantly less than for similar workers paid as employees. The differences are striking: one government expert calculated that a construction worker earning $31,200 a year before taxes would be left with an annual net compensation of $10,660.80 if paid as an independent contractor, compared to $21,885.20 if paid properly as an employee.[40] A study on port truck drivers found that annual median net earnings before taxes were $28,783 for drivers paid as contractors as compared with $35,000 for employees.[41]

In the port trucking industry, the typical port truck worker is misclassified[42] and the abuses engendered by misclassification are particularly stark. The economic

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[40] NELP, *supra* note 2, *citing* TIM CROWLEY, UI TAX CHIEF, U.S. DEPARTMENT OF LABOR, WORKER MISCLASSIFICATION – AN UPDATE FROM CONSTITUTION AVE. (Oct. 24, 2012), available at http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe575c-4edb-9e93-444cef85c837&dsp_meta=0.

[41] NELP, *supra* note 2, *citing* REBECCA SMITH, PAUL ALEXANDER MARVY & JON ZEROLNICK, THE BIG RIG OVERHAUL: RESTORING MIDDLE-CLASS JOBS AT AMERICA'S PORTS THROUGH LABOR LAW ENFORCEMENT 12 (2014), available at http://www.justice4ladrivers.net/BigRigOverhaul2014Finalsm.pdf.

[42] SMITH et al., *supra* note 10. Between 2010 and June 2017, 1,150 port truck drivers have filed claims in civil court or with the California Department of Labor Standards Enforcement. Judges have sided with drivers in more than 97% of the cases heard, ruling that port truckers were unlawfully misclassified as independent contractors. Brett Murphy, *Rigged: Forced into Debt. Worked past exhaustion. Left with nothing*, USA TODAY, June 16, 2017, available at https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.

conditions of the industry are such that economists, reporters, and advocates have described the system as "modern-day indentured serv[itude]," "sweatshops on wheels," and "sharecroppers on wheels."[43] Through independent contracting agreements and leases, trucking companies make drivers responsible for all truck-related expenses including truck purchase, fuel, taxes, insurance, maintenance, and repair costs.[44] As a result of these exploitative contracts, at best, port truck drivers work long hours for poverty level wages – and at worst, drivers have lost money, and been forced into debt or bankruptcy by exploitative contracts.[45]

The exploitative and often unlawful deductions facilitated by independent contractor misclassification can be shocking. For example, Samuel Talavera Jr., a port truck driver in Los Angeles, grossed $1,970 on a 2011 paycheck. However, as an independent contractor,

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[43] Murphy, *supra* note 42 (describing the leasing arrangement as modern-day indentured servitude and citing civil rights leader Julian Bond describing California port truckers the new black tenant farmers of the post-Civil War South); Steve Viscelli, *Truck Stop: How One of America's Steadiest Jobs Turned Into One of Its Most Grueling*, THE ATLANTIC, May 10, 2016, available at https://www.theatlantic.com/business/archive/2016/05/truck-stop/481926/ (sociology professor stating industry economist describes contemporary trucking as "sweatshops on wheels"); REBECCA SMITH, DAVID BENSMAN, AND PAUL MARVY, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA'S PORTS, 2010, available at https://www.nelp.org/wp-content/uploads/2015/03/PovertyPollutionandMisclassification.pdf (describing the industry as "sharecroppers on wheels").

[44] SMITH et al., *supra* note 43.

[45] SMITH et al., *supra* note 43; Murphy, *supra* note 42.

the money largely went back to his employer. After the lease and other truck expenses were deducted, he took home $33. In another 2012 paycheck, he made 67 cents.[46] For Rene Flores, a port truck driver in California, deductions and long hours – often 12 to 20 hours straight behind the wheel – can translate to a wage of $3 an hour, well below minimum wage.[47] Although a driver often initially perceives truck leasing arrangements to be akin to a mortgage, the terms in reality mean that a driver can end up losing tens of thousands of dollars in unlawfully deducted wages. When driver Talavera could not afford repairs on his truck, the company fired him and seized the truck – along with $78,000 he had paid towards owning it.[48] Max Galvan, a port truck driver in Southern California, similarly describes losing his truck after paying $35,148 in weekly lease payments.[49] As noted by one California labor commission hearing officer, "the truck was never [the driver's, and] he has nothing to show for all the time and money he spent."[50] Port trucking is a paradigmatic example of the ways in which misclassification hurts workers.

Across industries, an employer's insistence on labeling workers as contractors in itself deters workers

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[46] Murphy, *supra* note 42.

[47] *Id.*

[48] *Id.*

[49] Smith et al., *supra* note 43.

[50] Murphy, *supra* note 42.

from claiming rights under workplace laws that rely on individual complaints for enforcement, as workers tend to assume that their employer has classified them accurately.[51] Occupations with high rates of misclassification are also among the jobs with the highest numbers of workplace violations.[52] Anecdotal studies of working conditions for workers misclassified as independent contractors by their employers show elevated rates of wage theft and workplace injury.[53] Many workers incorrectly believe that they do not have an employer and are unable to navigate the intricacies of companies' contracting relationships to ascertain who

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[51] Workers who believe they are not eligible for workplace protections will likely not go to an enforcement body. The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-962T, BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 7 (July 15, 2008) (72% of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78% of all inspections undertaken by WHD). Anecdotally, advocates report to NELP that misclassification is often used by employers in combination with non-compete and non-disclosure or confidentiality provisions to intimidate and discourage low-wage workers, who often speak little or no English, from complaining or joining together to improve wages and conditions.

[52] *See* NATIONAL EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR, Oct. 1, 2005, available at http://www.nelp.org/content/uploads/2015/03/Holding-the-Wage-Floor2.pdf.

[53] NELP, *supra* note 2.

is responsible for workplace violations. When there is no clear line of accountability, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. Real-life examples abound, not only in trucking and delivery, but across the economy, in industries from construction to home care.[54]

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[54] *See, e.g.*, Murphy, *supra* note 42; SMITH et al., *supra* note 43; Brett Murphy, *Asleep at the wheel: Companies risk lives by putting sleep-deprived port truckers on the road*, USA TODAY, Dec. 28, 2017, available at https://www.usatoday.com/pages/interactives/news/rigged-asleep-at-the-wheel/. *See also* McClatchy DC, "Misclassified: Contract to Cheat," 2014, available at http://media.mcclatchydc.com/static/features/Contract-to-cheat/ (detailing the effects of misclassification within the construction industry); NATIONAL EMPLOYMENT LAW PROJECT, INDEPENDENT CONTRACTOR CLASSIFICATION IN HOME CARE, available at http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf (detailing the effects of misclassification within the home care industry).

III. SHOULD THE COURT FIND THAT THE "CONTRACT OF EMPLOYMENT" ANALYSIS REQUIRES A DETERMINATION OF WHETHER A WORKER IS AN INDEPENDENT CONTRACTOR, THE DETERMINATION MUST CONSIDER ALL INCIDENTS OF THE RELATIONSHIP AND NOT BE LIMITED TO THE UNILATERALLY IMPOSED TERMS OF THE CONTRACT.

A. Prime's argument is squarely contrary to the common law approach to determining independent contractor status.

Prime's argument to ignore the facts of the relationship between the worker and the company that engages him to work is fully at odds with the long-standing approach under the common law to determining employee status, as outlined by the Supreme Court in *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).[55] *United Ins.* construed the exclusion of independent contractors from the definition of "employee" under the NLRA. 29 U.S.C. § 152(3). The Court discusses the various factors relied on at common law to distinguish employees from independent contractors, emphasizing there is "no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be

[55] *Darden* holds that if a statute does not set out a definition of employment, courts should use the common law test. The scope of the employment relationship under the FAA and NLRA are thus determined using the common law test. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

assessed and weighed with no one factor being decisive." 390 U.S. at 258. *See also Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322, 324 (1992) (reaffirming both principles and citing *United Ins.* with approval).

Prime's argument, contrary to *United Ins.* and *Darden*, does not assess "all of the incidents" of the relationship, but focuses solely upon the terms of the unilaterally imposed "contract" between the driver and the putative employer. As shown in this case, in most lower-paid jobs, a driver and his or her employer do not bargain over terms and conditions in a contract: it is presented to the worker as a take-it-or-leave-it document, and most workers wanting a job take whatever the employer presents to them.[56]

For example, in *Green Fleet Systems, LLC*, JD(SF)-16-15 (ALJ J. Wedekind, Apr. 9, 2015),[57] NLRB Administrative Law Judge (ALJ) Wedekind considered whether port drivers working for Green Fleet under a lease agreement were "employees" for purposes of the NLRA. In deciding that they were, the ALJ noted that while the lease described the drivers as "independent contractors," the document had been drafted by a law firm retained by the employer for that purpose and had been presented to the Spanish-speaking drivers in English "for signature at the time they were retained, and all of the lease drivers signed it without any

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[56] SMITH et al., *supra* note 10; SMITH et al., *supra* note 43; J.A. 118, 156.

[57] Available at *nlrb.gov/Cases & Decisions/Administrative Law Judge Decisions* and at Westlaw, 2015 WL 1619964.

negotiations or changes." JD(SF)-16-15, slip op. at 40. For this reason, the ALJ did not afford the language of the lease any weight in determining the drivers' status. JD(SF)-16-15, slip op. at 50.

Similarly, the ALJ in *Intermodal Bridge Transport*, JD(SF)-48-17 (ALJ D. Montemayor, Nov. 28, 2017),[58] found the employer presented drivers with a lease document in English, despite the fact that it knew most drivers did not speak English, and did not offer translation services. Drivers were simply instructed where to sign and initial the lease and given a sample lease with the blanks filled in that they could copy. JD(SF)-48-17, slip op. at 5. The ALJ concluded that, even though the lease agreements referred to the drivers as "independent contractors," the terms of the agreements carried little weight because the agreements were "unilaterally created and imposed by IBT [Intermodal Bridge Transit]" so that drivers had no opportunity to bargain about the terms of the lease. JD(SF)-48-17, slip op. at 17.[59]

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[58] Available at *nlrb.gov/Cases & Decisions/Administrative Law Judge Decisions* and at Westlaw, 2017 WL 5852765. The case is pending on exceptions to the NLRB.

[59] *See also National Freight, Inc.*, 153 N.L.R.B. 1536, 1537-1540 (1965) (finding employee status, based on nature of relationship, despite fact lease agreement designated drivers as independent contractors); *Adderley Industries, Inc.*, 322 N.L.R.B. 1016, 1023 (1997) (finding electrician to be employee, based on nature of underlying relationship, despite fact workers signed "Independent Contractor Agreement" prepared by employer); *Sister Camelot*, 363 N.L.R.B. No. 13 (2015), slip op. at 6 (giving little weight to agreements designating workers as independent contractors because evidence showed workers "did not have the opportunity to bargain

B. Prime's argument is not supported by the statute.

Prime and its Amici argue that, in determining what constitutes a "contract of employment" for purposes of Section 1 of the FAA, the statutory language "compels a factfinder to take a 'categorical approach that focuses solely on the words of the contract and the definition of the relevant category.'" Petitioner's Brief on the Merits at p. 29, citing and quoting *In re Swift Transportation Co.*, 830 F.3d 913, 920 (9th Cir. 2016) (Ikuta, J., dissenting). This approach is completely contrary to the way labor and employment relationships are assessed, and would radically rewrite decades of authority holding that contractual terms by themselves do not dictate the status of an employment relationship.

Prime would like to avoid any analysis of the actual facts regarding trucking companies' relationships with their drivers and to permit the companies to unilaterally declare drivers to be "independent contractors," thus rendering them ineligible for the exemption granted by Congress to transportation workers. The Court should decline this invitation to radically rewrite the common law and reaffirm that, in determining employee status, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Nationwide Mut. Ins. Co. v.*

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over the terms of the agreements."); *NLRB v. United Ins.*, *supra*, at 259 (finding workers to be employees, in part, because the "terms and conditions under which [the workers] operate is promulgated and changed unilaterally by the company . . . ").

Darden, 503 U.S. 318, 324 (1992) (internal citations omitted).

Prime argues that had Congress intended the exemption in Section 1 to turn on the nature of the relationship between the parties rather than solely on the terms of the contract, it would have used language similar to that found in Section 2 of the FAA, which refers to "[a] written provision in any maritime transaction or a contract *evidencing a transaction* involving commerce . . . " (emphasis added). Petitioner at p. 30-31. But contrary to Prime's argument, examining the underlying relationship with regard to "a contract of employment" does not render the language in Section 2 mere surplusage. Section 2 sets forth the basic principle of the statute – that arbitration clauses in contracts involving interstate commerce are to be enforced – while Section 1 sets forth pertinent definitions and exceptions from coverage. Thus, Section 2 requires that an arbitration provision in a contract involving "commerce" must be enforced, while Section 1 exempts such contracts if they are a contract of employment "of seamen, railroad employees, or other class of workers engaged in foreign or interstate commerce."

Neither of the cases cited by Prime support its argument. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) did not address employment contracts, but involved an arbitration provision in a termite prevention contract and simply held that the words "evidencing" in Section 2 demonstrated Congressional intent to extend the FAA's reach to the limits of the Commerce Clause. *Allied-Bruce* cited and

relied on the Court's earlier decision *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956). While *Bernhardt* dealt with an arbitration provision in an employment contract, the holding does not support Prime's reading of the statute. *Bernhardt* focused on the proper interpretation of Section 2 and concluded the FAA did not apply to the contract at issue there since the work performed by the employee did not involve interstate commerce. 350 U.S. at 201. Hence, the Court in *Bernhardt* did not consider or apply the exemption set forth in Section 1.

Prime's argument suggests that Congress intended the term "contract" in Section 1 to mean something different than "contract" in Section 2. This is contrary to the long-standing canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332 (1994).

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the First Circuit.

Dated: July 25, 2018

Respectfully submitted,

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